Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1477

FAST MOTOR SERVICE, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION,

Appellees,

and

SCHNEIDER TRANSPORT, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION TO AFFIRM OF SCHNEIDER TRANSPORT, INC.

CHARLES W. SINGER,
2440 East Commercial Boulevard,
Ft. Lauderdale, Florida 33308,
(305) 772-9440.

SINGER, SULLIVAN & SMYTH, P. C.,
327 South LaSalle,
Chicago, Illinois 60604.
Of Counsel.

KEENAN PRINTING COMPANY 368

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criteria contained in Section 209(b) of the Interstate Commerce Act, 49 U.S.C. 309(b). This decision was affirmed by Review Board No. 2 of the I.C.C. following exceptions by Appellant and replies thereto by other parties. Subsequent Petition for Reconsideration and Petition for Further Hearing were denied by the Commission, Division 1 (acting as an Appellant Division) on March 26, 1973.

Appellant brought action in the United States District Court for the Northern District of Illinois, Eastern Division, to enjoin, set aside, and annul the Decision and Order of the Interstate Commerce Commission, denying its application for a permit. The District Court entered judgment on the complaint in favor of defendants, affirming the decision of the Interstate Commerce Commission.

ARGUMENT

The decision of the District Court is plainly correct. The District Court correctly found that its sole function was to determine whether the decision of the Interstate Commerce Commission is supported by substantial evidence. *Illinois Central Railroad Co.* v. *Norfolk & Western Railway Co.*, 385 U.S. 57, 87 (1956). (J.S. App. D. 42 a). In reaching its judgment in favor of defendants the District Court thoroughly analyzed the evidence of record in light of the criteria for certification as established by Congress in Sec. 209(b) of the Interstate Commerce Act. (J. S. App. D, 42 a- 47 a). The District Court correctly recognized that if the I.C.C. decision is supported by substantial evidence it is not the function of the Court to re-weigh the criteria. *Merchants Warehouse Company* v. *United States*, 283 U.S. 501, 508 (1931) and further, that even if the criteria were to be re-weighed, appellant could not prevail (J. S. App. D, 44 a).

The factual evidence regarding the statutory criteria of Section 209(b) of the Interstate Commerce Act has been set forth and analyzed in detail by both the Administrative Law Judge and the District Court. The Administrative Law Judge found on balancing all of the criteria that it had not been established that the proposed operation will be consistent with the public interest and the national transportation policy and should therefore be denied (J. S. App. A, 32 a). A majority of the District Court found that there was substantial evidence to support that finding. Analysis of the Administrative Law Judge's Report and Order and the District's Court's Decision herein, clearly establishes that the action of the Interstate Commerce Commission is supported by substantial evidence and is correct as a matter of law.

Section 209(b) of the Interstate Commerce Act, sets forth the statutory standards to which the Commission must adhere when deciding applications for contract carrier authority. The crucial section provides in pertinent part:

> In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of the shipper's requirements.

All of these five criteria should be weighed by the Commission in making its determination regarding consistency of the proposed operations with the public interest. This has been done by the Administrative Law Judge and reaffirmed by the District Court.

Regarding the number of shippers to be served by applicant, the Administrative Law Judge found that this criteria had been fulfilled by applicant (J. S. App. A, 28 a). The District Court concluded that applicant's presentation in this regard was "weak" rather than "strong", and went on to find that a determination of the weight to be given the first criterion is not within the Court's function and otherwise could not be found to overcome applicant's failure to satisfy other criteria (J. S. App. D, 44 a).

Regarding the nature of the service proposed, the Administrative Law Judge found the record to be fatally defective in establishing need for the proposed service (J. S. App. A, 29 a - 31 a). The District Court likewise analyzed applicant's evidence in this area and found it to be wanting (J. S. App. D, 44 a - 45 a).

The third criteria for consideration, the effect which granting the permit would have on the protesting carriers, was likewise subject to analysis by both the Administrative Law Judge and the District Court (J. S. App. A, 31 a, App. D, 45 a - 46 a).

Regarding the fourth area for consideration, the effect which denying the application would have on the applicant or its shipper, the Administrative Law Judge found that neither applicant nor shipper would be materially adversely affected (J. S. App. A, 31 a). This conclusion was also reached by a majority of the District Court after a review of the evidence (J. S. App. D, 46 a).

The final area for consideration involves the changing character of the shipper's requirements. Here the Administrative Law Judge concluded that this criterion was not a significant factor as the shipper's requirements were not marked by numerous or major changes (J. S. App. A, 32 a). The District Court in considering this matter found that applicant has again failed to support its position with substantial evidence (J. S. App. D, 46 a).

The District Court below correctly analyzed the decision of the Interstate Commerce Commission and the statutory criteria in finding that there was substantial evidence to support a denial of the application. That "substantial evidence" has been defined as follows:

> Substantial evidence is enough to justify, if trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury'. *Illinois C. R. Co.* v. *Norfolk & W. R. Co.*, 385 U.S. 57, 66 (1966).

Appellant now asks this Honorable Court to substitute its view concerning what should be done on the evidence of record for that of the Commission, *United States*

v. *Pierce Arrow Freight Lines, Inc.*, 327 U.S. 515, 536 (1946). This substitution of judgment is contrary to the conclusion reached by the Interstate Commerce Commission and a majority of the District Court.

CONCLUSION

Appellee respectfully submits, therefore, that the Appellant has presented no substantial question for the decision of this Court, and that the decision of the District Court affirming the action of the Interstate Commerce Commission should be affirmed.

Respectfully submitted,

CHARLES W. SINGER,
2440 East Commercial Boulevard,
Ft. Lauderdale, Florida 33308,
(305) 772-9440.

SINGER, SULLIVAN & SMYTH, P. C.,
327 South LaSalle,
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